United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2380 7cc

To be argued by
WILLIAM EPSTEIN B

Pgs

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ELDEN TURCOTTE and
FORREST GERRY, JR.,

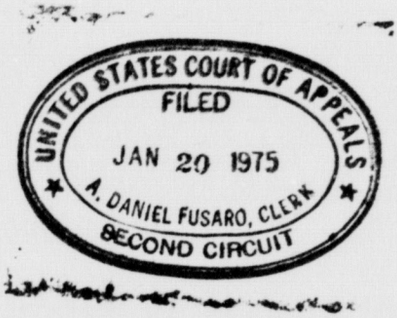
Appellants.

Docket No. 74-2408

Docket No. 74-2380

BRIEF FOR APPELLANT ELDEN TURCOTTE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ELDEN TURCOTTE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel

2

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ELDEN TURCOTTE and FORREST GERRY, JR., Appellants.	Docket No. 74-2408 Docket No. 74-2380

BRIEF FOR APPELLANT ELDEN TURCOTTE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish appellant Turcotte's guilt.

2. Whether the trial judge's failure to dismiss count two for the Government's failure to allege venue was error.

3. Whether the trial judge erred by failing to grant appellant's motion for a severance.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered on October 18, 1974, after a jury trial,* convicting Elden Turcotte of perjury before a grand jury (18 U.S.C. §1623), obstruction of justice by influencing the testimony of a grand jury witness (18 U.S.C. §§1503, 2), and conspiracy to commit perjury and obstruction of justice (18 U.S.C. §371).**

Appellant was sentenced to imprisonment for a term of one year and one day on each of the three counts, the sentences to run concurrently, with a recommendation that he be imprisoned at the Federal Correctional Institution at Danbury, Connecticut.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

---

*A previous trial of this case ended with the declaration of a mistrial after a juror became ill. (See transcript of proceedings dated March 18, 1974).

**This charge will be referred to simply as "conspiracy."

Statement of Facts

Appellant and Forrest Gerry, Jr., were indicted for obstruction of justice and conspiracy relating to a scheme to hide the ownership of two harness racing horses. Appellant was also indicted for perjury before a grand jury.

Prior to trial, defense counsel made a motion to sever appellant's case and to dismiss counts two (obstruction of justice) and three (conspiracy) because of lack of venue.

Counsel argued that severance was necessary because appellant's opportunity to receive a fair trial if he were tried with Gerry would be seriously prejudiced because of Gerry's recent conviction after a three-month trial in the "Superfecta fix" case (United States v. Peter Vario et al., 73 Cr. 1068). the press notoriety Gerry received during the months prior to and during that trial, and appellant's desire to disassociate himself from Gerry and to blame Gerry for appellant's unwitting role in the present case. Judge Platt denied the motion.

Defense counsel asserted that venue was lacking in the Eastern District of New York to try appellant for obstruction of justice because the indictment, on its face, asserted that the alleged obstruction occurred in the District of New Jersey. Further, counsel argued that the evidence itself would prove that venue was also lacking for the conspiracy count, even though the indictment averred that the conspiracy occurred in the Eastern District of New York as well as in the District

of New Jersey. Counsel asserted that the proof would show that if a conspiracy existed at all, it existed only in New Jersey. Judge Platt denied this motion as well.

At trial, the Government sought to prove its case primarily through the testimony of David Kraft, a New Jersey businessman and horse owner, who was deeply involved with Gerry and others in the Superfecta fix scandal (143-145*). Kraft testified that his sons owned the Kraft Hill Farms. He also stated that both he and Gerry no longer had the requisite licenses to own horses. According to Kraft, in March 1973 Gerry persuaded him to put two horses Gerry was to buy in the name of the Kraft Hill Frams. Gerry said he wanted the horses for purposes of re-sale (149-151).

Kraft related that in early April 1973 he realized that the farm was being considered the official owner of the two horses, "Adios Misty" and "Milty Hanover," when he started receiving purse winnings from Roosevelt Race Track (153). He claimed that he immediately called Gerry and told him to dispose of the horses (155). Notwithstanding this claim, Kraft cashed ten or twelve checks for winnings of these horses over the next several weeks (158).

On May 21, 1973, Kraft testified before a grand jury in the Eastern District of New York about race fixing (160). On

---

*Numerals in parentheses refer to pages of the transcript of the trial dated July 23, 1973, to August 2, 1973.

July 21, 1973, Kraft met with Gerry at Kraft's New Jersey home to discuss the two horses, as well as other horses and racing. According to Kraft, he told Gerry to dispose of the horses. Gerry allegedly said that appellant, who trained and raced the horses, wished to buy them (165-166). On July 25, 1973, Kraft was arrested for having perjured himself before the grand jury on May 21. He then decided to cooperate fully with the Government (166).

Gerry next visited Kraft in New Jersey on August 4, 1973. In a conversation recorded by the FBI with Kraft's permission, Gerry allegedly urged Kraft to fabricate a story of his role in the race fixing investigation (169-172). Gerry brought to that meeting the ownership papers for the two horses. These papers had been held by appellant. Gerry had Kraft's sons sign the ownership forms in contemplation of selling the horses (172-173).

On August 19, 1973, Gerry returned to Kraft's New Jersey home. He was accompanied by appellant, whom he introduced to Kraft for the first time (179). According to Kraft, at this meeting the three men discussed Kraft's future grand jury testimony (181).* On cross-examination, however, Kraft admitted that Gerry and appellant knew he had already been before the grand jury and had been arrested for perjury, thus rendering unlikely the possibility he would again be called before the

---

*This conversation was also recorded.

grand jury. He also stated that he meant the term "grand jury" in his direct testimony to refer to any investigative or administrative agency (341-343). Kraft also admitted that appellant's major purpose in making the visit was to obtain his share of the purse winnings that, as trainer and driver of the horses, were due him from Kraft, as the owner of the horses (192).* Following the discussion of the purse winnings, Gerry told appellant to wait outside in the car because Gerry and Kraft had private business to discuss. After appellant left, Gerry and Kraft discussed their dealings relating to the race fix scandals (186).

The next meeting between Kraft and Gerry occurred at the former's home on August 30, 1973. Kraft claimed that, while he and Gerry were dickering over money owed and possible future testimony strategy, he told Gerry that he was cooperating with the Government (189). Kraft admitted, and the tape recording of the meeting reflects, that at that point Gerry told Kraft to tell the truth to the Government and settle the matter of the horses (190).

The only contact between appellant and Kraft other than at the August 19 meeting occurred on September 7, 1973, at about 11:30 p.m., when appellant paid an unexpected visit

---

*Gerry later explained that he bought the horses as agent for Kraft and turned them over to appellant for training and racing, with the agreement that appellant would receive 55% of the profits, and Kraft 45%. This, according to Gerry, is a normal owner-agent-trainer relationship in the harness racing business (948-951).

to Kraft's home to seek his share of the purse winnings, which he still believed Kraft owed him (191). According to Kraft (this conversation was not recorded) he told appellant he would not release any money and that he was cooperating with the Government (192). After this brief meeting Kraft saw neither Gerry nor appellant again (193).

On September 14, 1973, appellant was called before a grand jury in the Eastern District of New York. Based upon the following questions and answers, he was later indicted for perjury:

> [Q]. Let me ask you this: With particular horses, how would you be involved with them as an owner, as a trainer, as a driver? Is there anything else that I'm leaving out because I'm not familiar with racing myself.
>
> A. No.
>
> Q. Let me ask you with all three, as an owner, as a trainer, as a driver, for any horses that you were an owner of, that you drive or that you are a trainer of, is Forrest Gerry the real owner of these horses?
>
> A. No.
>
> Q. Do you know anything about Forrest's hidden ownership of horses, the fact that he owns horses that are listed in other people's names?
>
> A. No.
>
> ...
>
> Q. Mr. Turcotte, have you driven any horses within the last nine months that you know have belonged to Forrest Gerry?
>
> A. That I knew belonged to Forrest Gerry?

Q. Yes.

A. No. I raced horses for a Mr. Kraft Hill Farms that I was under the impression and believe they belong to Kraft Hill Farms. From my understanding just rumors going around, I don't know if there's any truth to it that Forrest Gerry was the agent on these horses that they were bought by him for Kraft Hill Farms. The horses were sent to me registered for Kraft Hill Farms. The money that these horses earned was sent to Kraft Hill Farms. The claim check, when it was claimed, went to Kraft Hill Farms and Kraft Hill Farms as far as I am concerned, still owes me the money. Now, as far as Forrest Gerry owning these horses, not to my knowledge.

Q. Kraft Hill Farms who would be the owner there?

A. I think it's two boys. Their sons or Dave Kraft.

Indictment, Appendix B.

Other evidence for the Government was given by Robert Luehrman, registrar of the United States Trotting Association, who related that, on the face of the relevant documents, the horses were owned by Kraft Hill Frams, that the papers were kept by appellant as trainer-driver (which was normal in the trade), and that appellant informed the Association as to the sale of the horses, as is usually done by the party, owner, agent, or trainer-driver who has primary responsibility for the care of the horses (692-726). Also testifying was Lawrence Maller, racing secretary of Roosevelt Raceway, who stated that Kraft Hill Farms received all purse winnings as owner of the horses, but that appellant conducted all relevant business, including selling the horses, as a trainer-driver "agent," which

was normal practice for the business (732-759).*

The Government then rested, and defense counsel made a motion for a judgment of acquittal on the ground that the Government had failed to introduce enough proof of guilt to send the case to the jury (824-833). Judge Platt denied the motion.

The primary defense evidence was given by Gerry,** who related that he bought the horses as an agent at Kraft's behest. Gerry testified he used his own cash to buy the horses because, in the normal horse racing business procedure, the owners would accept only cash, and Kraft claimed he did not have the necessary $21,000 (957). After completing all relevant documents with Kraft Hill Farms as owner and himself as agent, Gerry turned the horses and papers over to appellant so that appellant could train and race the horses. He told appellant he would receive 55% of the purse winnings and Kraft 45%, which is a normal arrangement when a trainer-driver cares for and manages horses (944, 958-959).

---

*Also testifying for the Government were grand jury foreman, Ralph Wilkinson, who administered the oath to appellant (63-118), Daniel Goldberg, investigator for the New York State Racing and Wagering Board, who stated that Gerry was no longer licensed to own horses after 1968 (653-656), and James Murphy, who was involved with Gerry in the Superfecta fixes (800-803).

**Appellant did not testify, but called FBI Agent Joseph Fanning to contradict some statements made earlier by Kraft (853-862), and FBI Agent Sean Hilly, who recorded the August 19, 1973, meeting, and stated that appellant's appearance was a complete surprise (867-873).

Gerry called two more witnesses, Joseph Pullman, who was involved in the Superfecta fixes (880-920), and FBI Agent Arthur Walsh (924-936), both to contradict earlier statements made by Kraft.

Gerry insisted that all his discussions with Kraft concerning fabricated testimony were for the purpose of protecting Kraft from an upcoming investigation by the New Jersey Harness Racing Commission (945). He knew that Kraft had already been arrested for perjury before the grand jury and believed that Kraft would not be called again to testify before that body (946). He stated that appellant was totally unaware of any possible irregularity in the ownership of the horses, that appellant believed that Kraft owned the horses, and that the purpose of the August 19 and September 7 visits to Kraft were to obtain appellant's share of the winnings, which Kraft mysteriously refused to pay (948-953). Gerry also maintained that upon learning that Kraft was cooperating with the Government, he told Kraft to tell the entire truth (954).

Following the close of all the evidence, defense counsel made a motion for a judgment of acquittal on the ground that the Government had failed to prove appellant's guilt on any of the counts (1073). Judge Platt denied the motion.

The jury then found appellant guilty of all three counts charged in the indictment.

ARGUMENT

I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT.

Appellant was charged with perjury before a special grand jury investigating sports bribery (count one), attempting, with co-defendant Forrest Gerry, Jr., to influence David Kraft to give false testimony before the same grand jury (count two), and conspiring with Gerry to have appellant perjure himself and to influence Kraft (count three).* An examination of all the evidence in this case, however, shows that appellant was improperly convicted, for the proof was so meager as to all three counts that "a reasonable mind might [not] fairly conclude guilt beyond a reasonable doubt." United States v. Frank, 494 F.2d 145, 153 (2d Cir. 1974).

A. Appellant's testimony before the grand jury was not established as knowingly false.

The Government's theory of the perjury count was that appellant lied before the grand jury when he testified that two

---

*Hereafter the charges will be referred to as follows: perjury (count one); obstruction of justice (count two); conspiracy (count three).

horses were owned by Kraft Hill Farms* when the actually belonged to Gerry. The evidence, however, demonstrated that appellant's articulated belief that the Farms owned the horses was justified and that there was no basis for believing he was lying.

In his testimony, Kraft maintained that he agreed, as a favor to Gerry, to permit Gerry, who was not licensed to own horses, to put the ownership of the two horses in the name of Kraft Hill Farms, with the understanding that Gerry would immediately re-sell the horses.** He claimed that he was surprised to learn several weeks later that the horses were considered the property of the Farms and that purse winnings were being mailed to him. He insisted that as soon as he started receiving the stakes checks he told Gerry to dispose of the horses.

Gerry, on the other hand, said he bought the horses with his own money at Kraft's request because Kraft lacked the $21,000 cash required by the owher, that Kraft promised but failed to repay him, and that he had no interest in the horses other than to recover the $21,000 he used to buy them.

Regardless of any agreement between Kraft and Gerry as to the actual ownership of the horses, the undisputed testimony of

---

*Kraft Hill Farms was a shell corporation legally owned by Kraft's sons but actually managed by Kraft for the purpose of making speculative investments on horses. There was no "farm," all the horses being cared for by other persons, including trainers and drivers like appellant.

**There was evidence to show that the custom in the harness racing business was quick purchase and sale of horses.

Kraft, Gerry, Robert Luehrman, registrar, United States Trotting Association, and Lawrence Maller, racing secretary, Roosevelt Raceway, was that the horses were bought, registered, raced, and sold in the normal course of the harness racing business, and that the owner was listed as Kraft Hill Farms. This was the only information available to appellant, and the record does not show that appellant had notice of any secrets between Kraft and Gerry.

Both horses were bought on April 5, 1973, for a combined price of $21,000 cash, cash being the usual purchase medium because sellers fear that buyers will stop payments on checks if a horse is injured in transit. Gerry bought the horses as agent for the owner, Kraft Hill Farms, and turned the horses over to appellant, a highly reputable trainer-driver, for care, training, and racing. Gerry concluded what the record shows to be a standard financial arrangement with appellant: appellant was to keep 55% of the profits, and Kraft Hill Farms 45%. Gerry also left the ownership papers, indicating Kraft Hill Farms ownership, with appellant -- also a normal procedure when a trainer-driver has complete custodial care of a horse, including the right to sell the horse quickly.*

All the winnings of the horses were sent to Kraft Hill Farms, and, despite Kraft's assertions that he protested to Gerry Kraft's receiving of the checks, Kraft cashed the twelve

---

*See especially the testimony of Luehrman (692-720) and Maller (732-759).

purse checks over a period of several weeks in the Kraft Hill Farms account.

Against this undisputed factual background, visits to Kraft on August 9 and September 7, 1973, are easily understood -- appellant, who had not been paid any of his share of the winnings, went to get his share from the person he believed owned the horses. Thus, a review of Kraft's testimony concerning the August 19 conversation, the tape recording of that meeting, and Gerry's testimony establishes conclusively that appellant believed Kraft owned the horses. Kraft testified that on August 19, 1973, Gerry and appellant visited his New Jersey home. Appellant came to get his share of the purse earnings and to give Kraft the proceeds from the sale of the two horses, which appellant sold on August 14, 1973. Kraft stated that when he tried to interrupt appellant to say he did not own the horses appellant, in disbelief, disregarded the statement and "persisted in saying that he sold the horses for $15,000" (182-183).

Gerry, despite intense cross-examination, insisted that he told appellant that Kraft Hill Farms owned the horses, and that that is what appellant believed (951).

Before the grand jury on September 14, 1973, appellant gave the following responses, which led to the perjury charge in count one of the indictment:

> [Q]. Let me ask you this: With particular horses, how would you be involved with them as an owner, as a trainer, as a driver?

Is there anything else that I'm leaving out because I'm not familiar with racing myself.

A. No.

Q. Let me ask you with all three, as an owner, as a trainer, as a driver, for any horses that you were an owner of, that you drive or that you are a trainer of, is Forrest Gerry the real owner of these horses?

A. No.

Q. Do you know anything about Forrest's hidden ownership of horses, the fact that he owns horses that are listed in other people's names?

A. No.

...

Q. Mr. Turcotte, have you driven any horses within the last nine months that you know have belonged to Forrest Gerry?

A. That I knew belonged to Forrest Gerry?

Q. Yes.

A. No. I raced horses for a Mr. Kraft Hill Farms that I was under the impression and believe they belong to Kraft Hill Farms. From my understanding just rumors going around, I don't know if there's any truth to it that Forrest Gerry was the agent on these horses that they were bought by him for Kraft Hill Farms. The horses were sent to me registered for Kraft Hill Farms. The money that these horses earned was sent to Kraft Hill Farms. The claim check, when it was claimed, went to Kraft Hill Farms and Kraft Hill Farms as far as I am concerned, still owes me the money. Now, as far as Forrest Gerry owning these horses, not to my knowledge.

Q. Kraft Hill Farms who would be the owner there.

A. I think it's two boys. Their sons

or Dave Kraft.

Indictment, Appendix B.

There is no evidence introduced by the Government to demonstrate that these answers were knowingly false, a fact to be proved beyond a reasonable doubt. United States v. McGinnis, 344 F. Supp. 89 (D.Tex. 1972).* In fact, all the evidence tends to prove that appellant believed he was telling the truth. Thus, the Government failed to sustain its burden of proof on the perjury count.

B. The evidence failed to establish that appellant sought to influence Kraft's testimony before the special grand jury.

Appellant and Gerry were charged with obstruction of justice by attempting to influence Kraft's grand jury testimony. The only evidence concerning appellant's activities was given by Kraft, who testified that appellant visited his New Jersey home twice, on August 19, 1973, with Gerry, and on September 7, 1973, alone. This testimony, however, failed to establish beyond a reasonable doubt that appellant knew Kraft was to be called in the future as a grand jury witness, although such proof is a necessary element of the crime under 18 U.S.C. §1503.

---

*18 U.S.C. §1623 was enacted in 1970. There are few cases relating to the statute. However, it is apparent from reading the statute that perjured statements must be knowingly false, and that this knowledge is an element of the crime.

United States v. Bufalino, 285 F.2d 408, 416 (2d Cir. 1960); United States v. Griffin, 463 F.2d 177 (10th Cir.), cert. denied, 409 U.S. 988 (1972); United States v. Ryan, 455 F.2d 728, 733-734 (9th Cir. 1972); Walker v. United States, 93 F.2d 792-795 (8th Cir. 1938); United States v. Solow, 138 F.Supp. 812, 814 (S.D.N.Y. 1956).

In the August 19, 1973, conversation, Kraft, Gerry, and appellant discussed how to anticipate and prepare for the probable investigation into the ownership of the two horses. That conversation supplies no evidence that appellant knew Kraft was to be a grand jury witness; to the contrary, the record shows that neither Kraft nor appellant knew what a grand jury was, and that Kraft could not recall whether appellant had used the term "grand jury." At first, Kraft said:

> Mr. Turcotte begins to tell me a story of what we should say to the grand jury or to the FBI or any agency I am involved with regarding the ownership of the horses that Mr. Turcotte has in his possession....
>
> (181).

However, he went on to testify:

> [Defense counsel]: You say that during the course of that conversation, Turcotte was telling you what you should say to the Grand Jury. Is that what you remember?
>
> [Kraft]. Turcotte was telling me a story that had to be made up by any investigating -- I'm seeking the word -- any investigating agency, whether it be the FBI or Grand Jury, I don't know.
>
> I just sat back and let Mr. Turcotte speak and the tape will speak for itself.

Q. You say you recall specifically that Mr. Turcotte said to you that you should say to the Grand Jury, thus and so. Did he **ever** use the word "Grand Jury"?

A. Now, sir, if you're going to pin me on a word "Grand Jury" or a federal agency or what -- I know he said -- this part I can repeat -- "We are to say this."

Now, whether he added to it "Grand Jury" or who, I don't know.

Q. On your direct testimony, when either of these two gentlemen questioned you, Mr. Del Grosso or Mr. Shanley, you used the word "Grand Jury", do you remember that?

A. Very possibly.

...

... [The Court]. Are you certain whether or not the word "Grand Jury" was ever used?

[Kraft]. I'm not sure, sir. I know we were talking about some investigative agencies. Whether he said "Grand Jury" or "FBI" -- is there a distinction, sir? I don't know. I'm not an attorney.

(341-343).

Thus, it is clear that there was no comprehension of the grand jury as a separate entity.

Appellant's true purpose in attending the August 19, 1973, meeting can only be understood by reference to the testimony of Gerry. Appellant, who, according to Gerry, was an innocent dupe in the entire horse owning scheme, was told by Gerry that the purpose of the August 19 meeting was to help Kraft fabricate a story to protect Kraft Hill Farms' license before the New Jersey Harness Racing Commission:

[Defense counsel]. Did you have a conversation with Mr. Kraft and Mr. Turcotte or Mr. Turcotte by himself before you met Mr. Kraft concerning your visit with Mr. Kraft?

[Gerry]. Yes. I saw Mr. Turcotte and told Mr. Turcotte that Mr. Kraft had wanted him to come down and meet him to get his story straight and I told him the story about the Racing Commission and that is when he agreed to go down on Saturday and then Kraft wanted to change it to Sunday so that is when we went down, Sunday morning.

Q. At the time that you went down with Turcotte had Kraft told you that the New Jersey Harness Commission was trying to take away his son's license?

...

A. Yes.

...

THE COURT: What did [Kraft] say to you?

[Gerry]. He said when he got arrested which he got arrested a week or two before that, that it came out in the New Jersey papers that David Kraft had been arrested and associated with Kraft Hill Farms and he said when the Racing Commission heard about this they started checking on the ownership of the horses and horses that were racing by Kraft Hill Farms and David Kraft. He had a son and Kraft Hill Farms was in his son's name. One of his sons was in veterinary college and it would hurt him if he got in trouble and his license suspended and he wouldn't be able to work as a veterinary and with one thin or another that is why he wanted to get the story straight with Elden Turcottee on these horses.

THE COURT: He wanted to get the story straight with Elden Turcotte?

[Gerry]. That is right.

THE COURT: You had contact with Elden Turcotte, he did not?

[Gerry]. Yes, I did. He called his son in and what he wanted to tell his son what to be able to answer, what to say, so he wanted to make sure in case that the Racing Commission called Elden Turcotte, Elden Turcotte would tell them the same thing as his son told them.

(948-950).

Both Kraft and Gerry agreed that appellant's primary purpose in visiting Kraft on August 19, 1973, was to obtain his share of the purse winnings and to turn over to Kraft the proceeds of the sale of the horses since he believed Kraft to be the owner of the horses (See Argument, Point I-A, supra). Appellant participated in the story fabrication scheme in order to protect the legitimacy of Kraft's standing with the New Jersey Harness Racing Commission and thus to protect his own claim to 55% of the purse winnings, which Kraft had not yet paid.

Appellant's lack of knowledge that Kraft was to appear before the special grand jury is demonstrated by his late night visit to Kraft on September 7. Kraft testified that appellant's only purpose in visiting him was to obtain the money due him. The brief meeting consisted entirely of Kraft's refusal to give appellant the money and Kraft's advice to appellant that he was cooperating with the Government. No mention whatever was made of Kraft's testifying before a grand jury (191-192).

Thus, the Government failed to sustain its burden of proving, as the indictment charged, that appellant sought to influence Kraft's testimony before the grand jury.

C. The evidence did not establish conspiracy.

Appellant and Gerry were charged with conspiracy to have appellant perjure himself before the grand jury and to influence Kraft's testimony before the grand jury. Not only does the evidence fail to prove beyond a reasonable doubt that appellant perjured himself (see Argument, Point I-A, supra) or that he sought to influence Kraft's testimony before the grand jury (see Argument, Point I-B, supra), the evidence fails to prove that there was any agreement between Gerry and appellant to do anything whatever.

The Government failed to establish that Gerry and appellant agreed to do illegal acts, and the agreement is the cornerstone of conspiracy. United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938). The Government even failed to prove that appellant knew Kraft was to appear before the grand jury, which is a necessary element of conspiracy to influence that testimony. United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970).

In fact, the evidence shows that the "conspiracy" and the entire case against appellant were a fantasy of prosecutorial imagination. All witnesses agreed that appellant's reputation for honesty was impeccable. Both Kraft and Gerry, however, had long and recent criminal records. Gerry, who the Government alleged conspired with appellant, testified that appellant was an unwitting victim of a horse owning scheme he knew nothing about. The entire case against appellant was a farce.

II

THE TRIAL JUDGE'S FAILURE TO DISMISS COUNT TWO FOR THE GOVERNMENT'S FAILURE TO ALLEGE VENUE WAS ERROR.

Prior to the commencement of the second trial,* defense counsel made a motion, pursuant to Rule 18 of the Federal Rules of Criminal Procedure, to dismiss count two (obstruction of justice) on the ground that the indictment failed to allege venue in the Eastern District of New York. With respect to count two, Judge Platt denied the motion.

Judge Platt erred by refusing to dismiss count two because the indictment, on its face, averred that the alleged obstruction of justice occurred "within the District of New Jersey." Thus, clearly appellant could be tried only in New Jersey for the acts alleged in count two. United States v. Johnson, 323 U.S. 273, 276 (1944). Moreover, counsel's motion for dismissal was timely. Since the first trial ended in the declaration of a mistrial, all trial proceedings commenced anew "as if there had been no trial at all.... The parties are returned to their original positions and, at the new trial, can introduce new evidence and assert new defenses not raised at the first trial."**

---

*The first trial ended in a mistrial because of the sudden illness of a juror (see transcript of proceedings of March 18, 1974).

**In fact, counsel did make a dismissal motion based on venue at the first trial, but only after the trial had commenced. Judge Judd denied the motion then as untimely (Transcript of proceedings of March 14, 1974, at 851).

United States v. Mischlich, 310 F.Supp. 669, 672 (D.N.J. 1970), affirmed, 445 F.2d 1194 (3d Cir.), cert. denied, 404 U.S. 984 (1971); cf. United States v. Jones, 162 F.2d 72 (2d Cir. 1947).

III

THE TRIAL JUDGE ERRED BY FAILING TO GRANT APPELLANT'S MOTION FOR A SEVERANCE.

Prior to the second trial,* defense counsel sought severance of appellant's case. In his supporting affidavit, counsel alleged three grounds for severance: that Gerry had six weeks previously been convicted after a three-month trial of bribery and conspiracy to fix Superfecta races, and that evidence of Gerry's recent wrongdoings would, at the present trial for matters related to horse racing, affect the jury's judgment of Gerry's and appellant's guilt or innocence; that Gerry had been subject to extensive media exposure as a race fixer connected to organized crime; and that appellant, who had a strong reputation for honesty, planned to prove his innocence by calling Gerry as his principal witness. Judge Platt denied the motion.

Judge Platt abused his discretion by refusing to sever appellant's case. A review of the entire evidence demonstrates

---

*A mistrial was declared during the first trial (see transcript of proceedings of March 18, 1974). Appellant's motion for severance prior to the commencement of the second trial was timely. United States v. Mischlich, supra, 310 F.Supp. at 672, affirmed, 445 F.2d 1194, cert. denied, 404 U.S. 984.

that appellant suffered "substantial prejudice" from the joint trial. United States v. Calabro, 467 F.2d 973, 987 (2d Cir. 1972); United States v. Borelli, 435 F.2d 500, 502 (2d Cir. 1970), cert. denied, 401 U.S. 946 (1971). The present case for perjury and obstruction of justice relating to the ownership of two horses grew out of, but was only tangentially related to, the notorious Superfecta fix scandal case, in which Gerry and Kraft were deeply involved. All parties concede that appellant had no part whatever in the Superfecta scandal. In fact, following the August 19, 1973, discussion among Kraft, Gerry, and appellant, allegedly concerning the fabrication of Kraft's grand jury testimony, Kraft and Gerry sent appellant outside to wait while they discussed the Superfecta problem.

Thus, because of Kraft's and Gerry's substantial guilt, but in spite of appellant's total non-involvement in the Superfecta fix, much evidence of the fix was introduced at trial. Over the objection of defense counsel, Kraft testified that he, Gerry, and others paid money to influence the outcome of races, bet on races, and made large profits (145-147). Judge Platt ruled that facts relating to the Superfecta scandal were "background" for the present case (145-147). This ruling, however, was unfair to appellant, because Kraft and Gerry were involved in the fixes but appellant was not.

The jury in this case could not be expected to separate the serious and already proved wrongdoings of Kraft and Gerry relating to the massive Superfecta scheme from the similar but

distinct horse owning scheme in which Kraft, Gerry, and appellant were allegedly involved. Appellant's defense was seriously prejudiced by a joint trial because appellant claimed to have been totally innocent of the charges: he denied lying before the grand jury (count one), telling Kraft to perjure himself (count two), and conspiring with Gerry (count three).* Appellant's position was that he was unaware of any irregularity in the ownership of the two horses, believing Gerry the agent and Kraft the owner. His words to the grand jury and his seeking of purse money from Kraft are consistent with appellant's position.

Thus, appellant's attempt to establish that he was merely a luckless, unaware victim of a massive and complicated plot was hopelessly subverted by his joinder with Gerry.

IV

INSOFAR AS THEY ARE APPLICABLE TO HIM, APPELLANT TURCOTTE ADOPTS POINTS II AND III IN THE ARGUMENT OF APPELLANT GERRY.

---

*Appellant did not testify at trial, but on summation defense counsel argued appellant's total innocence.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the District Court ordered to enter a judgment of acquittal on behalf of appellant Turcotte.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ELDON TURCOTTE
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,
Of Counsel

Certificate of Service

January 20, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York and to the U.S. Department of Justice.

William Aptel